

TRANSFORMATIVE LEGAL EDUCATION*

GEO QUINOT†

Professor, Department of Public Law, Stellenbosch University

This article argues that significantly increased attention to theory (or theories) of legal education is not only imperative in order to improve the quality of legal education in South Africa, but is a crucial ingredient of constitutional transformation grounded in law in this country. The article puts forward a theoretical framework, called 'transformative legal education', in terms of which law could be taught at South African universities. In developing this framework the article draws upon insights from three basic dimensions of legal education, namely (1) the subject matter or discipline being taught (here law), (2) the teacher or the act of teaching, and (3) the student or learner. It is argued that these insights call for a fundamental shift from formalistic legal reasoning to substantive reasoning under a transformative constitution, for a shift towards a constructivist student-centred teaching model and for the recognition of a paradigm shift in knowledge from linear to non-linear, relational or complex. The article concludes by arguing that these different insights force law teachers to reassess critically their approach to legal education, and by explaining how these insights can contribute to a meaningful framework within which law can be taught responsibly in contemporary South Africa.

I INTRODUCTION

South African legal academia does not differ much from most of its common-law counterparts in the scant attention that is given to theory in teaching.¹ To be sure, theory regarding law abounds, also in law lecture halls, but theory about legal education is conspicuously absent. With a few notable exceptions,² academic writing on theory of legal education is a rare

* This text formed the basis of my inaugural lecture, delivered on 19 September 2011 at Stellenbosch University. My thanks go to Megan Alberts for expert research assistance and to Petrus Maree, Hector Meyer, Henk Smith and Marinelle Quinot for comments on an earlier draft. The usual disclaimers apply.

† BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch).

¹ See Fiona Cownie 'Searching for theory in teaching law' in Fiona Cownie (ed) *The Law School — Global Issues, Local Questions* (1999) 41, who discusses numerous empirical studies done in a number of common law jurisdictions and concludes (at 42–3) that 'it remains the case that the overwhelming weight of the evidence supports the view that research is more highly valued than teaching within universities throughout the Common Law world'. She continues to show that this results in very little attention being paid to educational theory in teaching law.

² Notable exceptions in recent years (although not all by South African authors) include Lesley Greenbaum 'Current issues in legal education: A comparative review' (2012) 23 *Stell LR* (forthcoming); Tracy Field 'Demystifying and problematising the paradigm shift affecting legal education' (2005) 16 *Stell LR* 324; Patrick Lenta 'Is there a class in this text? Law and literature in legal education' (2002) 119 *SALJ* 841; Tony Axam Jr 'A model for learning and teaching — rights and responsibilities in the new legal order' (2001) 17 *SAJHR* 404; Henk Botha 'Civic republicanism and legal education' (2000) 41 *Codicillus* 23; Stuart Woolman, Pam Watson & Nicholas Smith '“Toto, I’ve a feeling we’re not in Kansas any more”: A reply to Professor Motala and others on the transformation of legal education in South Africa' (1997) 114 *SALJ* 30; David Woolfrey 'Curriculum development in legal education: Some reflections'

phenomenon in South Africa.³ In this article I argue that significantly increased attention to theory (or theories) of legal education is not only imperative in order to improve the quality of legal education in South Africa, but is also a crucial ingredient of constitutional transformation grounded in law in this country. This realisation means that legal academics can no longer shrug off the consideration of educational theory as a fringe interest of a few 'teaching minded' colleagues. If the academic sector of the South African legal community is serious about our transition from authoritarian rule to constitutional democracy, it is imperative that legal academics, without exception, start to engage with educational theory as part of the core of their craft.

In what follows I shall put forward a theoretical framework within which law should, in my view, be taught at South African universities. I call this framework 'transformative legal education', and in short it is what I consider law teachers *can* and 'must do in order to achieve the aims of transformative constitutionalism'.⁴ I do not propose a new theory, but rather a theoretical framework; that is, a framework that draws upon a number of insights from different disciplines to guide the teaching of law. In setting up this framework, I shall focus on three basic elements of education, namely (1) the subject matter or discipline being taught (here law), (2) the teacher or the act of teaching and (3) the student or learner. I shall align legal education as a whole with contemporary theories and insights emerging from the study of each of these constituent elements. All of these I consider to hold profound implications for the way that law teachers approach their craft. These insights call for a fundamental shift from formalistic legal reasoning to substantive reasoning under a transformative constitution, for a shift towards a constructivist student-centred teaching model and for the recognition of a paradigm shift in knowledge from linear to non-linear, relational or complex. In conclusion I shall argue that these different insights force us to reassess critically our approach to legal education and I shall explain how these

(1995) 112 *SALJ* 151; C R M Dlamini 'The law teacher, the law student and legal education' (1992) 109 *SALJ* 595.

³ Other external measures of academic engagement with theory in legal education confirm the limited attention given to this area in South Africa. At the last three Conferences of the Society of Law Teachers of Southern Africa (2008, 2009, 2011), the biggest general law conference in South Africa, only eight sessions out of a total of 111 sessions focused specifically on matters of education (including clinical programmes) and even within those sessions not all papers dealt with educational theory in depth. Formal training in education also remains a rare phenomenon among full time academic members of law faculties in South Africa, although there is clearly an emerging trend for such academics to register for postgraduate certificates/diplomas in higher education.

⁴ This is an adaptation of the definition given by Cora Hoexter for transformative adjudication as 'what judges must do in order to achieve the aims of transformative constitutionalism'. See Cora Hoexter 'Judicial policy revisited: Transformative adjudication in administrative law' (2008) 24 *SAJHR* 281 at 286.

insights can contribute to a meaningful framework within which law can be taught responsibly in contemporary South Africa.

II A NEW APPROACH TO LAW AS THE SUBJECT OF EDUCATION

One of the first scholars to point to the fundamental shift in legal culture that our new constitutional dispensation envisaged was Alfred Cockrell. He labels the pre-constitutional view of law as a 'formal vision of law' and notes 'factors contributing to this ascendancy of the formal vision' as including:

'[A]n emphasis on narrowly-construed "private law" subjects in the training of law students; an aversion to the teaching of "policy matters" as part of the law syllabus at universities; a belief that good lawyering was largely a matter of textual exegesis and technical expertise.'⁵

With reference to John Dugard's inaugural lecture, Cockrell notes that this vision 'denied a creative role in judicial law-making'.⁶ Against this background, he argues that the new constitutional dispensation involves 'changes . . . at a deep level within the South African legal system' that call for 'a substantive vision of law' involving an obligation to 'engage with . . . moral and political values' in adjudication.⁷ In this substantive vision of law, a legal rule will only be valid if it 'conform[s] in some degree with notions of what is substantively right, just or good'.⁸ Most importantly, though, it is not merely the acknowledgement of such substantive notions behind legal rules that characterises the fundamental shift called for in South African legal culture, but also the open engagement with such substantive reasons. Etienne Mureinik labels this shift as one from a 'culture of authority' to a 'culture of justification'.⁹ The new constitutional dispensation thus introduces a fundamental shift in legal methodology as much as (or perhaps even more than) a shift in substantive law. As Cockrell rightly points out, this signals a 'paradigm shift with profound implications'.¹⁰

A number of scholars have put forward similar accounts of the fundamental shift in law and our legal culture under the new constitutional dispensation. Thus, former Chief Justice Langa notes that it is 'no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions' but that 'judges bear the ultimate responsibility to justify their decisions not only by reference to

⁵ Alfred Cockrell 'Rainbow jurisprudence' (1996) 12 *SAJHR* 1 at 1–7, drawing on P S Atiyah & Robert S Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (1987). Cf Woolfrey op cit note 2 at 154.

⁶ Cockrell op cit note 5 at 8.

⁷ Ibid at 3, 9.

⁸ Ibid at 7.

⁹ Etienne Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31 at 32.

¹⁰ Cockrell op cit note 5 at 10.

authority, but by reference to ideas and values'.¹¹ One of the most influential of these accounts has been Karl Klare's notion of transformative constitutionalism.¹² He describes this notion embodied in our constitutional transition as:

'[A] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.'¹³

Integral to this project is the open engagement with substantive values in justifying legal outcomes. However, Klare notes a disconnect between the prevailing legal culture in South Africa and the commitment of the Constitution¹⁴ to social change. In particular, he notes that despite the 'substantively postliberal and transformative aspirations'¹⁵ of our Constitution, our legal culture is still a highly conservative one, meaning that South African lawyers instinctively rely on a legal methodology that places 'relatively strong faith in the precision, determinacy and self-revealingness of words and texts' and that interpretation of such legal texts is 'highly structured, technicist, literal and rule-bound' with little emphasis on values and policy.¹⁶ Instead, Klare calls for the development of a legal culture that embraces the normative framework put forward by the Constitution in its methodology. This involves not only overt substantive reasoning but also recognition of the possibilities for creativity in applying and developing the law to meet the aims of social transformation.

So what are the implications of all of this for legal education? That is, what do the fundamental changes in our discipline mean for the teaching of that discipline? There are a number of fairly obvious responses. First, the substance of what is being taught is and should be, of course, quite different from what it was in the past. New areas of law such as fundamental rights and judicial review must be accommodated in the law curriculum, and the curriculum should be adjusted to reflect the new paradigm based on a supreme justiciable Constitution. But also, established areas of law that have been fairly settled for a considerable period of time are now being transformed in the light of the Constitution. Some of the most remarkable examples are the law of delict and of property.¹⁷ Teaching these areas of law is

¹¹ Pius Langa 'Transformative Constitutionalism' (2006) 17 *Stell LR* 351 at 351–3.

¹² Karl E Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146.

¹³ *Ibid* at 150.

¹⁴ Constitution of the Republic of South Africa, 1996 ('the Constitution').

¹⁵ Klare *op cit* note 12 at 156.

¹⁶ *Ibid* at 168.

¹⁷ Sandra Liebenberg *Socio-Economic Rights* (2010) chs 6 and 7; Dennis M Davis & Karl Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 403.

thus not business as usual either.¹⁸ Students should be trained also in these areas, particularly those that have not seen the same level of constitutional infusion, such as the law of contract,¹⁹ to assess long-established common-law rules against the values entrenched in the Constitution.

This brings me to the second implication of transformative constitutionalism for legal education. Students should be educated not only in the new substance of the law but also in the new legal method or reasoning mode. As noted above, the new constitutional dispensation calls for a substantive mode of legal reasoning. Matters of morality and policy, even politics, can no longer be excluded from legal analysis. This means that such matters should also enter the law lecture hall.²⁰ Law teachers will be failing their students if they do not enable them to engage with these ostensibly extra-legal considerations in dealing with the law.²¹ This also requires a much greater emphasis on the context in which law operates, and the society that it intends to regulate, or in our case to transform.²² The door of the law lecture hall can no longer be shut to what is going on outside it. The shift required from law teachers to instruct students in this new paradigm will in many instances be quite radical — even, as Cockrell notes, traumatic.²³ It will call into question our own professional sensibilities and will require a critical self-assessment of whether we are able to engage in the kind of value-based reasoning that we are now required to teach. It also highlights the need for a much greater interdisciplinary approach to legal education. In the first instance, law must be presented not as a collection of distinct branches, each existing within its own silo, but in an integrated fashion that reveals the connections among the various branches, especially in relation to the shared normative value system that underlies it all (or should underlie it all), flowing from the Constitution. This does not only apply to the distinct substantive branches of the law — say contract and administrative law — but also the distinct legal traditions coexisting in South Africa. While constitutional supremacy implies ‘one system of law’,²⁴ we cannot view that system in the singular. That one system is made up of various, sometimes conflicting, legal traditions: various forms of common law, customary law and religious law. Teaching ‘the law’ means

¹⁸ Cf Davis & Klare op cit note 17 at 413.

¹⁹ Dikgang Moseneke ‘Transformative constitutionalism: Its implications for the law of contract’ (2009) 20 *Stell LR* 1; Liebenberg op cit note 17 at 358–75; Davis & Klare op cit note 17 at 468–81; D M Davis ‘Developing the common law of contract in the light of poverty and illiteracy: The challenge of the Constitution’ (2011) 22 *Stell LR* 845.

²⁰ Cf Botha op cit note 2 at 23–31; Woolman et al op cit note 2 at 54; Woolfrey op cit note 2 at 154–5.

²¹ Cf Woolman et al op cit note 2 at 54; Woolfrey op cit note 2 at 156, 158.

²² Cf J B K Kaburise ‘The role of legal education in a changed South African society: An outsider’s reflections’ (1987) 20 *CILSA* 316 at 322; Woolfrey op cit note 2 at 156.

²³ See Cockrell op cit note 5 at 10.

²⁴ *Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) para 44.

coming to grips with this plurality.²⁵ Additionally, much more emphasis must also be placed on the integration of law with other disciplines, obvious examples being economics, philosophy, political science, sociology, psychology and public administration, to name a few. Without skills in these areas, law students will not be equipped to engage in the substantive mode of reasoning required within transformative constitutionalism. In this package of skills that law students should acquire, perhaps the most important is that of creativity. As Klare notes,²⁶ our constitutional drafters could not have envisaged that we will transform our society in light of the Constitution while relying on the legal rules and legal sensibilities of the pre-constitutional era. Our constitutional transition challenges us to be creative, to imagine new ways of doing things in law. In turn, this challenges legal education to foster creativity. We must train lawyers to be innovators under the Constitution, not simply technicians.²⁷

As demanding as these implications of our legal transition may be for legal education, the biggest challenge lies not in *what* we teach, either in substantive law or skills, but in *how* we teach: that is, our methodology in legal education. Just as transformative constitutionalism requires judges to adjudicate by using not only the new rules of our constitutional democracy but also the new adjudicative method, our new legal paradigm requires law teachers to teach differently. To my mind, this is the most important implication of our transition for legal education; but certainly it is also the most difficult. As law teachers, our legal culture manifests in the way we teach and it is thus our teaching methodology with which we need to engage critically in order to align what we do with the transformative aspirations of our Constitution.²⁸ This is difficult for, as Klare notes, these ‘characteristic rhetorical strategies’ and ‘professional norms’ seem normal and obvious to us and ‘in the absence of critical self-reflection and/or transformative experience, appear to be natural and fixed’ rather than contingent and culturally situated as they in fact are.²⁹ We may thus not be aware of the significant influence that these practices have on what we do in class, and hence their

²⁵ See D P Visser ‘The role of legal education in the internal conflict of laws’ in A J G M Sanders (ed) *The Internal Conflict of Laws in South Africa* (1990) 67; Joan Church ‘Reflections upon reconstruction and legal education’ (1996) 59 *THRHR* 114; Kaburise op cit note 22 at 327; L M du Plessis ‘Regsteorie in praktyk, regspraktyk in teorie en regsopleiding’ *Wetenskaplike Bydraes van die PU vir CHO Reeks H: Inogurele Rede, Nr 80* (1981) 1 at 17. On the challenges of legal pluralism in South Africa see G J van Niekerk ‘Regspluralisme’ in J C Bekker, C Rautenbach & M N I Goolam (eds) *Inleiding tot Regspluralisme in Suid-Afrika* (2006) 3; C Himonga & C Bosch ‘The application of African customary law under the Constitution of South Africa: Problems solved or just beginning?’ (2000) 117 *SALJ* 319; T W Bennett ‘Legal anthropology and comparative law: Disciplinary compromise?’ (2010) 21 *Stell LR* 4.

²⁶ Klare op cit note 12 at 156, 171.

²⁷ Cf Du Plessis op cit note 25 at 3, 5.

²⁸ See Axam Jr op cit note 2 at 411–12.

²⁹ Klare op cit note 12 at 166–8. Julian Webb refers along similar lines to these traditional notions of identity and method within legal teaching as ‘the silences of

impact on law graduates' perceptions of the law and their role in society.³⁰ Significantly, these practices can have a limiting effect not only on law graduates' inclination to drive transformation but indeed also on their ability to be innovators under the Constitution.

This may seem very abstract, so let me look at a few more concrete examples of aligning teaching methodology or pedagogy with transformative constitutionalism. If we want to instil in law graduates the shift from a 'culture of authority' to a 'culture of justification' — that is, an understanding of the validity of a legal position not because of the force behind it (eg as contained in a statute or court judgment) but because of the sound normative considerations upon which it is explicitly based — our pedagogy needs to reflect justification and not authority. We should thus ask ourselves what perception of law is instilled by a methodology that only involves a sage standing on a stage and imparting 'The Law' to a group of as yet uninitiated apprentices. What happens when law students by-and-large remain passive recipients of information? What view do students form of the law when they are relentlessly confronted with a pre-selected package of authoritative materials that they should simply learn by rote within a rigid curricular structure? What is conveyed by an assessment strategy that simply requires the replication of the views imparted as authoritative in these materials and contact sessions and rewards those that reproduce these as closely as possible to the original?

In my view, such practices reflect and thus preserve a culture of authority.³¹ Transformative constitutionalism forces us to imagine a different methodology. A methodology that enables students to participate actively in developing their own understanding of rules not only against their own background context, but also, critically, against the background context of others, would aid in developing an understanding of the law as a phenomenon that is socially constructed and situated. Such a methodology should focus the attention on the assumptions underlying legal rules and their normative make-up,³² and leave the black-letter, technical dimension to background learning, hence highlighting the importance of the normative justification for rules rather than their mere authoritative existence.³³ Rather

legal education': Julian Webb 'Where the action is: developing artistry in legal education' (1995) 2 *International Journal of the Legal Profession* 187 at 192.

³⁰ Cf Marlene le Brun & Richard Johnstone *The Quiet (R)evolution* (1994) x, 57; Axam Jr op cit note 2 at 411.

³¹ Cf P Singh 'Quality assurance in higher education in South Africa' (2000) 14 *SAJHE* 5 at 5–6; Axam Jr op cit note 2 at 406–9, 413.

³² Cf Botha op cit note 2 at 31.

³³ I am certainly not suggesting that knowledge of particular legal rules is not important or should not form part of legal education. However, as Julian Webb op cit note 29 at 189 neatly puts it: 'By focusing on the "how", it is not intended to refute the need to acquire some legal knowledge in the propositional sense of that term. However, that should not be the sum of our endeavour. Our concern as educators should focus far more centrally on questions of *use* and *control* of knowledge.' (Original emphasis, footnotes omitted.)

than attempting to present students with a coherent, contained body of rules that constitute the law, our methodology should present them with the fragmented, pluralist, inconsistent and often conflicting claims to authority that in aggregate constitute the law.³⁴ The methodology should encourage students to be critical and not simply to accept a position because it is stated in an ostensibly authoritative source or even because it is asserted to be correct by the lecturer. The methodology should enable students not to be satisfied with knowing what the legal position is but to imagine (also in radical terms) what it could be.³⁵ And, perhaps most importantly, our methodology should be explicit. We should explain to our students why we do things the way we do, and be able to justify our methodological choices. By adopting such a pedagogy, we will be able to infuse a transformed vision of the law, as dictated by our Constitution, into the way that students become members of the legal community.

This brings me to our second element in setting up a theoretical framework of transformative legal education, namely the teacher or the act of teaching. The question in this second element is whether there is a way to conceptualise a pedagogy that will enable us effectively to teach students in law *and* instil in them the new transformative aspirations of our discipline. Put differently, what options exist in educational theory that can help us construct a pedagogy that complements the fundamental shifts in our discipline?

III CONTEMPORARY VIEWS OF EDUCATION: FROM TRANSMISSION TO CONSTRUCTION

One of the most significant developments in theoretical perspectives on learning over the last half century has been the influence of constructivism.³⁶ Fosnot captures the gist of this theory when she states the following:

‘Constructivism is a theory about knowledge and learning; it describes both what “knowing” is and how one “comes to know”. . . . [T]he theory describes knowledge not as truths to be transmitted or discovered, but as emergent, developmental, nonobjective, viable constructed explanations by humans engaged in meaning-making in cultural and social communities of discourse. Learning from this perspective is viewed as a self-regulatory process of struggling with the conflict between existing personal models of the world and discrepant new insights, constructing new representations and models of reality as a human meaning-making venture with culturally developed tools and symbols, and further negotiating such meaning through cooperative social activity, discourse, and debate in communities of practice.’³⁷

³⁴ Cf Axam Jr op cit note 2 at 413.

³⁵ Ibid.

³⁶ See D C Phillips ‘The good, the bad, and the ugly: The many faces of constructivism’ (1995) 24 *Educational Researcher* 5; Paul Boghossian *Fear of Knowledge* (2006) vi.

³⁷ Catherine Twomey Fosnot (ed) *Constructivism: Theory, Perspectives, and Practice* 2 ed (2005) ix.

However, as many scholars in the vast literature on constructivism and education have pointed out, constructivism is not a theory of teaching; it does not present us with a ready-made pedagogy, a 'cookbook teaching style' or pat set of instructional techniques.³⁸ Rather, as a theory of learning, of how we manage to develop new insight and skills, constructivism holds significant implications for teaching. It serves as a point of departure upon which a theory of teaching can be constructed, as 'ground zero' from where teachers can develop their pedagogy.³⁹

In my view, constructivism provides us with the theoretical paradigm to structure a pedagogy that will serve the purposes of transformative legal education. In the limited scope of this article, it is not possible to explore in depth constructivism in all its many facets and strands, or even its implications for education fully.⁴⁰ I will thus simply point out some key characteristics of constructivist thought that bear most pertinently on framing transformative legal education.

Perhaps the best way to capture the core of constructivism is the statement, '[k]nowledge is not found but made'. This means that when one gains new knowledge, one does not simply absorb some objective, fixed set of ideas. In this perspective, knowledge is 'temporary, developmental, socially and culturally mediated and thus non-objective'.⁴¹ The development of knowledge — learning — is accordingly an active and subjective process. One learns, or in constructivist terminology constructs knowledge, by connecting new experiences to one's existing knowledge base.⁴² By doing so one does 'not only add to the original knowledge base but also restructure[s] that pre-existing knowledge base'.⁴³ This subjective process of constructing knowledge happens not only at the individual level but also within a particular socio-cultural context. As one of the leading constructivist educationalists, Paul Cobb, states, 'the cognitive process, ie the individual construction of . . . knowledge, takes place against a socially constructed plane'.⁴⁴ Knowledge is thus subjective, first, because it can only be con-

³⁸ Catherine Twomey Fosnot & Randall Stewart Perry 'Constructivism: A psychological theory of learning' in Fosnot op cit note 37 at 33; A Zietsman 'Constructivism: Super theory for all educational ills?' (1996) 10 *SAJHE* 70 at 70–2; Marie Larochelle & Nadine Bednarz 'Constructivism and education: Beyond epistemological correctness' in Marie Larochelle, Nadine Bednarz & Jim Garrison (eds) *Constructivism and Education* (1998) at 3–5.

³⁹ Zietsman op cit note 38 at 73.

⁴⁰ Even referring to constructivism in the singular seems to be an oversimplification of the range of constructivist thought. See Phillips op cit note 36 for a comprehensive account of the many dimensions of constructivism.

⁴¹ E Venter 'A constructivist approach to learning and teaching' (2001) 15 *SAJHE* 86 at 86–7.

⁴² James Pelech & Gail Pieper *The Comprehensive Handbook of Constructivist Teaching* (2010) 8.

⁴³ Ibid.

⁴⁴ Paul Cobb 'Where is the mind? A coordination of sociocultural and cognitive constructivist perspectives' in Fosnot op cit note 37 at 39–45.

structed by and exist within the mind of the individual knower⁴⁵ and, secondly, because that construction happens within a particular 'knowledge constructing community'.⁴⁶ Not only are the tools that we utilise to construct new knowledge, that is what we consider appropriate mechanisms of engagement, socially contingent, but the distinct bodies of knowledge that we can engage with — the disciplines — are also socially constructed.⁴⁷ In Cobb's words, learning is thus 'both a process of self-organization and a process of enculturation'.⁴⁸

The implications of these constructivist insights for teaching are quite radical. One of the most important implications is that teaching can no longer be viewed as a transmission exercise; that is, an activity in which a knowledgeable teacher transmits discrete bits of information to students who duly absorb it. In the words of another leading constructivist, Ernst von Glasersfeld, as teachers '[w]e can no longer justify the intention of conveying our ideas to receivers (as though ideas could be wrapped in little packages by means of words)'.⁴⁹ Since learning can only occur through construction of knowledge, teaching must involve learners as active participants. The role of the teacher thus changes from that of the sole and authoritative holder of knowledge that must be imprinted on the blank slates of her students to a role of facilitator that must guide students' own efforts at construction.⁵⁰ Conversely, the learners' roles change from passive recipients of information to active knowledge constructors who 'are responsible for defending, proving, justifying, and communicating their ideas to the classroom community'.⁵¹

Another important implication of constructivism for teaching is the central role of context in learning. At the individual level, constructivism tells us that a particular learner's own context is determinative of that learner's construction of the knowledge being taught. The class experience is thus only a part of the learning process, with each student's own existing knowledge base forming the crucial other part through which the new class experience is internalised to add to and reconstruct the learner's knowledge, which may result in learning. At the communal level, constructivism tells us that active engagement within the particular knowledge community defines learning so that the quality of learning depends largely on the communal context. The richer students' engagement with the knowledge community is, the richer we can expect their learning to be. This again emphasises the need for active student engagement. Here constructivism aligns with notions

⁴⁵ Ernst von Glasersfeld 'Introduction: Aspects of constructivism' in Fosnot op cit note 37 at 5.

⁴⁶ Venter op cit note 41 at 87.

⁴⁷ Phillips op cit note 36 at 5.

⁴⁸ Cobb op cit note 44 at 50–51.

⁴⁹ Ernst von Glasersfeld 'Why constructivism must be radical' in Marie Larochelle, Nadine Bednarz & Jim Garrison (eds) *Constructivism and Education* (1998) at 23–27.

⁵⁰ Ibid at 27; Larochelle & Bednarz op cit note 38 at 11; Fosnot & Perry op cit note 38 at 34; Phillips op cit note 36 at 11; Venter op cit note 41 at 91.

⁵¹ Fosnot & Perry op cit note 38 at 34; Phillips op cit note 36 at 11.

of differentiated instruction that call for the use of different teaching strategies in order to enable students with unique learning styles to engage effectively in knowledge construction.⁵² But it also implies that the richness of the knowledge community becomes a key consideration in effective teaching. Since students learn by engaging, not just on a vertical level with the teacher but also critically on a horizontal level with peers,⁵³ diversity in the learning community becomes a strength, even a prerequisite. As students actively engage with a greater variety of background experiences (that is, with others that bring very different existing knowledge bases to the knowledge community) their own existing knowledge bases are increasingly challenged. As a result, the tension between their 'existing personal models of the world and discrepant new insights'⁵⁴ increases so that the struggle to reconcile these, which is the key to constructing new knowledge, intensifies. By this process, greater learning is hence facilitated.

Finally, constructivism tells us that learning is not a simple linear process.⁵⁵ Teaching thus cannot be conceptualised as a simple linear process of transferring information from the expert to the amateur in a one-directional manner either. Learning and thus teaching is rather a complex process, which is non-linear in nature.⁵⁶ This implies that teaching must allow for difference; there cannot be only one way of doing or knowing. The teacher must actively recognise that her construction of knowledge is not the final word and that students' constructions have legitimacy.⁵⁷ Students' own construction not only informs their own knowledge base but also contributes to the restructuring of the entire knowledge community's construction, including that of the teacher. It is thus imperative that teaching should focus on the engagement and relationship among members of the learning group. It is the engagement activity itself that is of value. In this way the multidimensionality of the learning process is facilitated. This realisation also reaffirms the insight that learning, and thus teaching, occurs not only in a vertical model but also in a horizontal one, where everyone in the knowledge community learns from each other.⁵⁸ Students' engagement with each other is thus as important as engagement with the teacher and the materials. The complex nature of learning also implies that knowledge and its construction cannot be broken up into 'discrete sub-skills' that can be taught separately and in isolation, and that concepts cannot be taught out of context.⁵⁹ It is only within context and

⁵² Pelech op cit note 42 at 16.

⁵³ E Bitzer 'Understanding co-operative learning: A case study in tracing relationships to social constructivism and South African socio-educational thought' (2001) 15 *SAJHE* 98 at 98–100.

⁵⁴ Fosnot op cit note 37 at ix.

⁵⁵ Fosnot & Perry op cit note 38 at 11.

⁵⁶ Ibid at 11; Phillips op cit note 36 at 11.

⁵⁷ Phillips op cit note 36 at 10, with reference to Von Glasersfeld.

⁵⁸ Bitzer op cit note 53 at 100.

⁵⁹ Fosnot op cit note 37 at ix.

within a relational network that knowledge can exist. Teaching a particular body of knowledge should thus proceed from this relational perspective.

I think the potential of constructivist pedagogies for transformative legal education should already be evident. Such pedagogy emphasises the central role of context, which we have seen is also a key concern in transformative constitutionalism. The learning process, including the knowledge constructed, is conceptualised as socially contingent, which affirms the view of law as a social construct. This pedagogy opens the door to contextual influences outside the strict confines of legal doctrine and embraces an approach that draws attention to both the real-world grounding of law and its relationship with other disciplines. It is a pedagogy that involves teaching law in a much broader social context. It also defies an atomistic approach to the various branches of the law in favour of a holistic view, a view that attempts to ground the learning of legal rules within the broader legal framework, highlighting the relationship between different rules and branches of law rather than only the isolated technical dimensions of the particular rule or branch.⁶⁰ Constructivism furthermore allows for the acceptance, even the embrace, of divergence. Since constructivist pedagogy does not insist on a single correct approach or answer, students are encouraged to conceptualise the discipline in divergent ways. In this way, students can become much more comfortable with pluralism and conflict in a pluralist legal system such as ours.

As noted above, our biggest challenge in teaching law in a manner true to transformative constitutionalism is to reflect the culture of justification and reject a culture of authority in the *way* that we teach. Constructivist pedagogy allows us to do exactly that. It enables a form of ‘epistemological democracy’ in which teaching ‘serve[s] ends opposed to the “colonization of the knowledge of students by that of scholars”’.⁶¹ In this pedagogy, not only can we *tell* students about the value of searching for justification for legal rules, as opposed simply to accepting their authority; we can also *show* students how it is done by teaching in that manner. Under constructivist pedagogy, the teacher is no longer the sole authoritative figure in the class, presenting students with ready-made knowledge for them simply to accept. Rather, the process of learning occurs by students engaging with the materials and each other and forming their own constructions that they must justify within the knowledge community,⁶² guided by the teacher using a set of explicit and clear normative values. Thus the students learn the law in the way that the law is supposed to function as envisaged by transformative constitutionalism. Students learn that the authority of a position rests on the justification for that view and not on the command behind it.

⁶⁰ Cf C Claassen ‘Outcomes-based education: Some insights from complexity theory’ (1998) 12 *SAJHE* 34 at 35; Field op cit note 2 at 324–31.

⁶¹ Larochelle & Bednarz op cit note 38 at 11 with reference to Paul Cobb. Cf Claassen op cit note 60 at 35.

⁶² Fosnot & Perry op cit note 38 at 34.

Constructivist pedagogies also create scope for creativity. By viewing the learning process as one of constructing new knowledge and rejecting a single 'correct' construction of knowledge, the possibility of imagining new ways of doing things is significantly enhanced. This, as we have seen, is another critical imperative of transformative constitutionalism. Again, the value of such pedagogy is not only that it creates the scope for innovation in the classroom, but that it inculcates in students the necessity of approaching law creatively, as well as the ability to do so.

Eventually constructivism focuses the attention on how learning occurs;⁶³ in other words, how it is that through engagement in a teaching environment a student can learn something. The result is that by adopting constructivist pedagogy, we can become much more sensitive to the underlying process of teaching and learning and its socio-cultural characteristics. We are forced to engage with our assumptions about knowledge, learning and our students. This self-awareness can help us to unmask 'characteristic rhetorical strategies' and 'professional norms'⁶⁴ in legal education that we may consider 'natural and fixed', but which are indeed socio-culturally contingent and which may stand in the way of true transformation. Constructivism thus allows us to interrogate our legal culture critically as teachers of law, which forms a key part of the reassessment of legal culture generally under transformative constitutionalism.

The significant overarching promise of constructivist approaches to legal education is that all of these benefits are embedded in the *way* that law is taught. By joining the substantive commitments of the governing theory of our discipline with pedagogy, these advantages, aligned as they are to the project of transformative constitutionalism, will as a result become part of our students' paradigm of the law.

There is, however, a particular danger that constructivist pedagogies may reinforce the privileging of certain skills and forms of knowledge that may again lead to exclusion of alternatives — the very thing that constructivist pedagogies aim to avert.⁶⁵ The realisation of this threat in legal education would of course also be destructive of the project of transformative constitutionalism. This danger lies in the possibility that constructivist pedagogy may not pay sufficient attention to those skills that students need to participate in the knowledge community, and which are thus necessary for them to be able to learn. Popkewitz argues that discourses in constructivist pedagogies regarding active learner participation 'generate principles which classify and divide those who have and do not have the appropriate dispositions, sensitivities, and capabilities to act and participate'.⁶⁶ As a result,

⁶³ Cf Phillips op cit note 36 at 11.

⁶⁴ Klare op cit note 12 at 166, 168.

⁶⁵ Thomas S Popkewitz 'Dewey, Vygotsky, and the social administration of the individual: Constructivist pedagogy as systems of ideas in historical spaces' (1998) 35 *American Educational Research Journal* 535.

⁶⁶ Ibid at 558.

‘exclusions are produced through the systems of recognition, divisions, and distinctions that construct reason and the reasonable person’.⁶⁷ Critically, these divisions may not be acknowledged explicitly and may seem natural, when they are in fact social constructs.⁶⁸

Other commentators have noted similar challenges in adopting constructivist pedagogies. In particular, the central notion of constructivism — that one learns by assimilating new experiences into one’s existing knowledge base — implies that a teacher must have an accurate view of a student’s existing knowledge base in order to assist that student to engage effectively with new experiences that can lead to learning.⁶⁹ If the teacher operates on false assumptions about students’ existing knowledge base, a constructivist pedagogy may inhibit learning and exclude those students for whom the baseline assumptions are incorrect. This is particularly important when dealing with a diverse student body in which students do not share the same background experiences. Exclusion can quite easily occur in such classrooms where a particular ‘normalized vision of the natural’ student predominates.⁷⁰ However, there are a number of strategies to address these challenges.

First, the problem of underlying and implicit assumptions regarding what is considered as reason within a particular knowledge community, and the appropriate tools to justify particular constructions of knowledge may be countered by retaining a dynamic vision of the discipline at issue. Transformative legal education thus involves both dynamic visions of law as a discipline in terms of transformative constitutionalism and the process of learning by adopting constructivist pedagogy. While the latter functions to open up the teaching and learning process, adherence to transformative constitutionalism ensures that the knowledge field, law, is not viewed as stable, fixed or one-dimensional, thus keeping open the possibility for radically different constructions. Accordingly, no single conception of justification is privileged.

A second strategy to avoid these dangers is obviously to develop a more accurate view of the students’ knowledge base. This brings us to our third theme: a focus on learners. Since it is critical in adopting a constructivist pedagogy for teachers to understand better their students’ backgrounds and, importantly, students’ experiences of knowledge construction, we need to interrogate our own assumptions about how students approach knowledge and consider whether these assumptions are still accurate. As Von Glasersfeld notes, a constructivist orientation may ‘bring the realization that students

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Phillips op cit note 36 at 11; Von Glasersfeld op cit note 45 at 6; Von Glasersfeld op cit note 49 at 27.

⁷⁰ Popkewitz op cit note 65 at 558. Popkewitz *ibid* notes the empirical research of Walkerdine that shows how ‘child-centered pedagogies’ can privilege particular ‘bourgeois and gendered conceptions’ of the ‘normalized vision of the natural child’ that can lead to exclusion of those learners who do not adhere to such notions from effective education under constructivist pedagogies.

perceive their environment in ways that may be very different from those intended by the educators'.⁷¹

IV EDUCATION AND STUDENTS' KNOWLEDGE WORLD

While I think that one should be careful not to jump to conclusions about the traits of a new generation of students currently entering higher education (variously called the digital, Net or Google generation or, in Marc Prensky's evocative words, 'digital natives')⁷² and the demands of this new generation on education,⁷³ there does seem to be rapidly growing consensus across a wide field of commentators that some rather big changes in dealing with knowledge are afoot. Leading scholars from diverse backgrounds, such as Oxford neuroscientist Baroness Susan Greenfield⁷⁴ and director of the Library of Alexandria Prof Ismail Serageldin,⁷⁵ tell us that the impact of the digital revolution on our society and in particular on the way we engage with knowledge is not simply a quantitative change but a qualitative one. It is a change that touches the very nature of our perception of knowledge. Greenfield talks of a 'mind change' as the cognitive equivalent of climate change, and Serageldin argues:

'We are on the cusp of a profound transformation of how knowledge is structured, accessed, manipulated and understood, how it is added to, and how it is displayed and communicated, that is the most profound transformation in the history of humanity since the invention of writing.'⁷⁶

The differences between engaging with information in printed form and in digital form indeed seem profound. Looking at these differences and their impact on our knowledge experiences, it may not be an overstatement to say that the hold of Gutenberg on our intellectual endeavours has been broken by the advent of digital technologies.⁷⁷ The dominance of the printed word over our knowledge construction following Gutenberg's invention of the letterpress led to a 'literary and linear' paradigm of knowledge.⁷⁸ This

⁷¹ Von Glasersfeld op cit note 45 at 6.

⁷² Marc Prensky 'Digital natives, digital immigrants' (2001) 9 *On the Horizon* 1.

⁷³ See Sue Bennett, Karl Maton & Lisa Kervin 'The "Digital Natives" debate: A critical review of the evidence' (2008) 39 *British Journal of Educational Technology* 775; OECD/CERI 'New millennium learners: Initial findings on the effects of digital technologies on school-age learners' (2008) available at <http://www.oecd.org/dataoecd/39/51/40554230.pdf>, accessed 11 January 2012 on the lack of empirical studies investigating the implications of digital technology on education.

⁷⁴ Susan Greenfield 'The brain of the 21st century: From basic neuroscience to social policy' Fifth Public STIAS Lecture 2011, delivered at Stellenbosch University on 8 June 2011.

⁷⁵ Ismail Serageldin 'The shape of tomorrow — part one: The seven pillars of the new knowledge revolution' (2010) available at <http://www.serageldin.com/SpeechDetail.aspx?SID=2Y6A%2fTjniPL22nT39rblQ%3d%3d>, accessed on 11 January 2012.

⁷⁶ Ibid. Also see Peter M Tiersma *Parchment Paper Pixels* (2010) 4.

⁷⁷ Nicholas Carr *The Shallows* (2010) 77, 104.

⁷⁸ Ibid at 10, 76.

paradigm has shaped the way we conceive of knowledge and physically how our brains engage with the construction of knowledge. As a result, Nicholas Carr states:

‘For the last five centuries . . . the linear, literary mind has been at the center of art, science, and society . . . it’s been the imaginative mind of the Renaissance, the rational mind of the Enlightenment, the inventive mind of the Industrial Revolution, even the subversive mind of Modernism. It may soon be yesterday’s mind.’⁷⁹

Digital technologies, and in particular the Internet, offer us a very different paradigm of knowledge. While initially digital information closely resembled printed form, something which is reflected in terminology such as web *pages* and bookmarks, the digital form has now departed radically from its print counterpart. Hyperlinks and search functions allow us to zoom in directly on relevant bits of information within a text, radically changing our mode and speed of access. These functions also allow us to experience the links between different texts directly. A direct and immediate engagement with the relationship between distinct bits of information becomes possible. As Serageldin notes, this changes our conception of knowledge from a bricks-in-a-wall model whereby distinct parts form the whole, to a more fluid view, such as water flowing in a river, with much more dynamic and interrelated qualities.⁸⁰ Even the activity of scrolling and clicking through a digital document as opposed to turning the pages of a book is a very different form of engagement.⁸¹

In addition, the format of digital information, particularly on the Internet, is now also far removed from printed text. A typical web page contains many different areas of distinct but mostly related fragments of information. At the same time, the PC allows us to juggle simultaneously between different information sources fulfilling different functions and, significantly, to integrate these distinct nodes of information.⁸² The conventional form of information is also no longer restricted to text, and the interaction among text, graphics, sound and video has become commonplace.⁸³ Even the relationship between these different formats of information may be different in digital form as opposed to print. Whereas in print we would mostly consider text to be the primary vehicle for conveying information, with graphics as a secondary format mostly utilised to illustrate the text,⁸⁴ the

⁷⁹ Ibid at 10.

⁸⁰ For a fascinating illustration of this perspective, see the maps depicting the social and natural sciences as ‘diagrams of interactivity’ rather than the traditional ‘taxonomies of subjects’ reproduced in Serageldin op cit note 75 diagrams 1 & 2.

⁸¹ Carr op cit note 77 at 90; Tiersma op cit note 76 at 4.

⁸² See University College London ‘Information behavior of the researcher of the future’ (2008) available at <http://www.ucl.ac.uk/slais/research/ciber/downloads/ggexecutive.pdf> accessed 11 January 2012.

⁸³ Serageldin op cit note 75.

⁸⁴ There are of course notable exceptions to this generalisation, including genres such as animated novels and most children’s literature.

relationship may be exactly the opposite in digital format, with graphics, sound and video playing a much more central role and text, especially large portions of text, increasingly taking a backseat in representing information.

Not only is the way we access information electronically radically different from traditional print form, but also the way we create information. Unlike creating a text in print, electronic texts are not static.⁸⁵ An author can constantly change the published text and automatically update readers' version of it. This 'provisional nature of digital text' inevitably impacts on the way that an author approaches the text and the creative process.⁸⁶ But perhaps one of the most significant differences between engaging with knowledge in print and digital forms is that in the electronic paradigm the engagement becomes 'bidirectional'.⁸⁷ Digital platforms can allow users to engage actively with information. Unlike print form, the digital form thus greatly enhances activity on the part of the user. She can comment directly on a piece and add to an evolving text. Some sources of information, such as Wikipedia, allow readers to participate continuously in the creation and revision of the source. Carr notes in his 2010 work that '[m]any observers believe it's only a matter of time before social networking functions are incorporated into digital readers, turning reading into something like a team sport'.⁸⁸ The new iPad and its rivals have indeed now made this prediction a reality. This interactivity enabled by the digital revolution is not restricted to textual knowledge experiences. Many non-textual activities hitherto regarded as largely passive encounters, such as attending the theatre or a musical recital, can be converted into interactive experiences with reliance on digital media. An audience can, for example, interact with an orchestra by means of cell phone requests, or a theatre audience can engage in discussion of a play in real time using social networks such as Twitter.⁸⁹

These examples of differences between traditional forms of knowledge experiences, primarily through the printed word, and digital experiences, predominantly by means of the Internet, signal a shift from a largely linear conception of knowledge to a more relational or networked paradigm. My purpose is not to engage in a normative debate about this shift. Whether this is a good or bad development, only time will tell, and it is probably far too early to form any firm views on the issue, given that the Internet has only been around for 20 years and in South Africa Internet usage probably lags considerably behind that in Europe and North America where much of the debate is situated. For our purposes, it is sufficient simply to note this change as something that is indeed happening. Our question is rather what the implications of such a change may be for transformative legal education that embraces constructivist pedagogy. We noted that this pedagogy takes as a

⁸⁵ Serageldin *op cit* note 75; Tiersma *op cit* note 76 at 42, 169.

⁸⁶ Carr *op cit* note 77 at 107; Serageldin *op cit* note 75.

⁸⁷ Carr *op cit* note 77 at 85.

⁸⁸ *Ibid* at 106.

⁸⁹ See *ibid* at 96–7.

point of departure each student's own knowledge experience as the basis for learning. The question is thus what these changes mean for our understanding of our students' existing knowledge bases as our point of departure in training a new generation of law students.

A number of recent studies have shown that reliance on electronic media, principally the Internet, for information purposes significantly alters the way that people engage with knowledge. A 2006 study found that when people read text online, they do not follow a linear method, reading from side to side and from top to bottom as one would read printed text. Rather, they quickly scan pages in a movement pattern resembling the capital letter F.⁹⁰ A study in 2008 concluded that the '[d]igital immersion' of the Net generation, those that grew up with the Internet, 'has . . . affected the way they absorb information'.⁹¹ Rather than reading in the traditional fashion, they 'skip around, scanning for pertinent information of interest'.⁹² Yet another study has shown that people rarely spend significant periods of time on a given webpage but rather bounce in and out of pages in a matter of seconds.⁹³ It is thus not surprising that a major study by a group of researchers at University College London into the use of two research sites concluded that 'there are signs that new forms of "reading" are emerging as users "power browse" horizontally through titles, contents pages and abstracts going for quick wins'.⁹⁴ These changes in information behaviour are not simply changes of habit that can be undone easily by subjecting the wayward to 'correct' academic or information practices. In 2008 an experiment showed that people's brain patterns actually changed because of Internet use.⁹⁵ This study confirmed that knowledge experiences on the Internet result in very different areas of the brain being used than in traditional print-text reading. The changes in knowledge paradigm that the digital revolution is bringing about are thus deep-seated and fundamental.

Most of these studies, and others,⁹⁶ have also shown that digital versions of knowledge experiences are second nature to the Net generation because of their much higher level of digital immersion and the fact that they have grown up in the digital era. In short, this generation views the digital experience of knowledge as the paradigm. Prensky's metaphor of digital

⁹⁰ Jakob Nielsen 'F-shaped pattern for reading web content' *Alertbox* (2006) available at www.useit.com/alertbox/reading_pattern.html, accessed 11 January 2012.

⁹¹ Don Tapscott 'How to teach and manage "Generation Net"' *BusinessWeek Online* (10 November 2008) available at http://www.businessweek.com/technology/content/nov2008/tc20081130_713563.htm, accessed 11 January 2012.

⁹² *Ibid.*

⁹³ Carr op cit note 77 at 136.

⁹⁴ University College London Study op cit note 82 at 10.

⁹⁵ Carr op cit note 77 at 120–1.

⁹⁶ Mizuko Ito, Heather Horst Matteo Bittanti, danah boyd, Becky Herr-Stephenson, Patricia G Lange, C J Pascoe & Laura Robinson *Living and Learning with New Media: Summary of Findings from the Digital Youth Project* (2008); OECD/CERI op cit note 73.

natives has become popular in describing this development. Digital is this new generation's native tongue. In contrast, those of us that grew up before the advent of information technology but find ourselves nevertheless also in this new digital world are but 'digital immigrants'⁹⁷ or, as one of my older colleagues recently noted, digital refugees. We may operate in the digital world and even accept that we cannot escape it, but we will never be native speakers of the language of technology.⁹⁸ For us, the linearity of the old world of printed text will always remain the paradigm and thus inform our point of departure.

From an educational perspective, and in particular a constructivist one, the real difficulty thus lies in the realisation that '[o]ur students are no longer "little versions of us"'.⁹⁹ This makes it particularly difficult for us to develop an understanding of our students' knowledge base and their experiences of knowledge construction as prerequisites for effective constructivist teaching. The ongoing debates around, and studies into, the nature of knowledge construction in a digital paradigm should therefore be rich sources for developing effective teaching practices. As we have seen, this paradigm places a high premium on networked ways of thinking and the relationship between bits of information, on instant interaction and high levels of integration between different forms of engagement. It eschews linear, step-by-step approaches and the stability or permanence of information. In my view, it is imperative that we incorporate these insights into our teaching strategies in order to engage our students effectively.

The challenges that these insights bring to legal education in particular are enormous. Law is after all, in Peter Tiersma's words, 'surely one of the most literate of all professions'.¹⁰⁰ Texts, and with them the linear printed tradition of knowledge construction, lie at the core of modern law¹⁰¹ and thus legal education. Most people familiar with the law and legal education in South Africa will consequently stagger at the thought of abandoning linear, step-by-step analyses and notions of certainty in training lawyers. Our law and hence legal education is filled with, some may even argue characterised by, cause-and-effect, hierarchies, dichotomies, binaries, logical reasoning, all of which is premised on ascertainable and fairly stable (in some views even fixed) authoritative rules. As I have noted above, such a paradigm of knowledge may be quite alien to a new generation of law students. Our students may thus have little interest and even less aptitude in the traditional knowledge paradigm of the law. However, this does not mean that they are lazy or ill-equipped for tertiary legal education per se, but are simply different. They may struggle to cope with our 'bricks-in-a-wall' methodology,

⁹⁷ Prensky op cit note 72 at 2.

⁹⁸ Ibid.

⁹⁹ Marc Prensky 'Listen to the Natives' (December 2005/January 2006) *Educational Leadership* 9.

¹⁰⁰ Tiersma op cit note 76 at 1.

¹⁰¹ See generally Tiersma ibid.

not because they do not grasp it, but because there is nothing intuitive about that approach viewed from their 'water-in-a-river' paradigm of knowledge. No amount of bridging courses aimed at filling what *we* perceive to be a gap between past students' entry-level capacity and attitudes, and that of the current generation will eliminate this fundamental disconnect between a new generation's knowledge paradigm and the traditional approach to law and legal education. A much more fundamental shift in legal education is called for.

But in a country such as South Africa we cannot expect that our students will share uniform levels of digital immersion.¹⁰² As we strive to diversify our student body, increasingly we should expect that our students' prior knowledge experiences, digital and non-digital, will vary significantly. Given the fundamental nature of the shift from print to digital engagements with information, these differences in knowledge bases are again not simply a matter of degree but indeed of paradigm. This means that we are dealing with a body of students who do not only exhibit varying degrees of mastery of particular skills sets, which we typically assume to be part of prior learning in higher education, but who also may not even share the same basic conception of knowledge. This realisation poses enormous challenges in designing learning experiences. The dangers of a pedagogy that assumes particular knowledge traits loom large here. We run the risk of either alienating our students by adopting an approach that seems foreign to them, given their radically different paradigm of knowledge engagement, or excluding students from learning by wrongly assuming that they are all digital natives.¹⁰³ In most of our classes at present, I would suggest that we run both these risks.

However, these challenges also bring opportunities. The uneven changes in students' knowledge world both among themselves and compared to lecturers bring the importance of diversity in teaching to the fore. It makes teaching in a differentiated manner an imperative. It also reinforces the importance of horizontal learning in addition to vertical learning, so that students can learn from each other to enhance learning experiences that may otherwise fail to engage them effectively. The vastly different role of the teacher also becomes clear. It is no longer possible for us digital immigrants, or refugees, to be the sole authoritative figures in class given that at least some of our students' fluency in a new knowledge paradigm far surpasses our own. This forces us into a teaching style that actively co-opts our students and makes them active partners in mediating learning experiences. And finally, these changes in knowledge worlds bring home the need to adopt a pedagogy that does not insist on a single correct way of doing things. As we have seen above, constructivist pedagogies offer us a methodology to

¹⁰² A recent study even warned against the dangers of an assumption of universal access in OECD countries, OECD/CERI op cit note 73.

¹⁰³ These dangers are amplified by studies showing that differentiation in digital skills often follow socio-economic status and gender lines. Ibid at 4–6.

capitalise on these opportunities thrown up by the challenges of a new knowledge world. But more than that, these challenges offer us opportunities to internalise the basic tenets of transformative constitutionalism in our method. As I have argued above, these shifts in teaching style align well with the shifts in our discipline necessitated by a new vision of law in South Africa.

V COMPLEXITY AND RELATIVISM

The law teacher may be forgiven at this point for throwing her hands up in the air at these changes affecting the three dimensions of legal education and the subsequent developments ostensibly called for, sighing that they inevitably result in a slide to relativism. If these developments result in context being everything in law, in knowledge existing only within the construction of the individual knower and in a new fluid knowledge paradigm constantly in flux, what is the point of discussing a *theory* of legal education? Is the whole endeavour not so relative that theory can play no meaningful role?

In my view transformative legal education can help us to realise that the changes facing legal education in South Africa do not result in relativism, but rather in the recognition of, and the subsequent identification of, ways to cope with the complexity inherent in the endeavour of legal education. It allows us to acknowledge that law as a means of organising society is mired in complexity, that the process of teaching and learning is a complex one, and that the new knowledge world of our networked society draws out the complex nature of knowledge rather than suppresses it. But this theoretical framework also allows us to realise that the developments in the three areas of legal education do not result in a slide to extreme relativism. The embrace of complexity in all these areas, which lies at the heart of transformative legal education, does not undermine all authority and knowledge in favour of a view that 'anything goes'. As the late, great Paul Cilliers tells us:

'A complete relativist is in a way nothing but a disillusioned foundationalist. One could, however, deny the existence of absolute points of reference, without slipping into relativism. From the structuralist and post-structuralist perspective, meaning, whether conceived linguistically or socially, is generated through relationships of difference in a complex network of interaction. Meaning conceived in this way is neither arbitrary nor per definition unstable.'¹⁰⁴

In incorporating these insights from complexity theory into legal education, we have yet much to learn from Cilliers, but that is a discussion for another day.¹⁰⁵ For the moment it is perhaps sufficient to note that

¹⁰⁴ Paul Cilliers 'Complexity, ethics and justice' (2004) 5 *Tijdschrift voor Humanistiek* 19 (references omitted). See also Paul Cilliers *Complexity & Postmodernism* (1998) 115.

¹⁰⁵ For a discussion of how one could start to apply insights from complexity theory to legal education see Julian Webb 'Why learning law really is a complex business'. Paper presented at the 6th Annual LILI Conference, University of Warwick available at <http://www.ukcle.ac.uk/learning-in-law-annual-conference/2004/papers/webb>, accessed on 11 January 2012; Webb op cit note 29.

complexity in all the dimensions of legal education is not something that we can wish away or that we should shy away from. As scholars such as Julian Webb have noted, 'professional problem-solving is about the creative management of complexity and uncertainty'.¹⁰⁶ Engaging with complexity thus goes to the core of what legal education should be all about.

VI CONCLUSION

When we bring together these insights from the three areas of legal education, our discipline, teaching and students, it seems to me that we have a unique opportunity — and even more than an opportunity, an obligation — in contemporary South African legal education to respond to various fundamental changes that we witness in society around us. Legal education stands at a unique crossroads in this regard. We are faced with a fundamental change in our discipline; not merely an adjustment of what was before but a paradigm shift in law and legal method. We are faced with a paradigm shift in teaching and learning, putting learning and the learner and her context at the centre, and we are faced with a paradigm shift in dealing with knowledge, moving from dominance of the printed word to digital immersion. All of these changes force us to reassess critically where we stand in legal education in relation to what is happening around us. Will we close our eyes to the paradigm shifts affecting every aspect of our craft, or will we engage with them?

In my view, all of this requires legal education to change, and to change radically. But as responsible intellectuals, it is also our duty to drive that change in terms of proper theoretical frameworks. In the absence of a guiding theoretical framework, the change will amount to little more than Cockrell's rainbow jurisprudence, rainbow education perhaps, that 'flit before our eyes like rainbows, beguiling us with their lack of substance'¹⁰⁷ and that projects a false sense of harmony where none exists or should exist. Thus, for change in legal education in South Africa to proceed responsibly, it must be grounded in theory. I believe that transformative legal education can provide us with such a theoretical framework. This framework embraces transformative constitutionalism as the guiding theory to our discipline, constructivist pedagogies as directing our teaching strategies, and an acknowledgement of the advent of a fundamentally different notion of knowledge brought about by the digital revolution. Moreover, as I have attempted to show in this article, the theoretical insights from the three elements of legal education that I highlighted can all be aligned with the overarching aims of transformative constitutionalism.

If we are serious about societal change grounded in law in South Africa, law teachers must consciously assume their role in the transformative project. We must acknowledge that the way we go about teaching law will shape the

¹⁰⁶ Webb *op cit* note 29 at 193.

¹⁰⁷ Cockrell *op cit* note 5 at 11.

next generation's perception of law and its role in this country. Neil Gold states that law teachers' 'ways of behaving are metastatements about law, lawyering and justice' to our students.¹⁰⁸ He thus concludes that '[c]on-scioussness about teaching makes it more likely that we will be *intentional* in respect of both content and form in our instruction'.¹⁰⁹ Seventeen years into our democracy, I think that it is high time that we as law teachers start to ask critically what we are doing in our classes to further the cause of the Constitution's 'enterprise of inducing large-scale social change through nonviolent political processes grounded in law'¹¹⁰ towards a 'society based on democratic values, social justice and fundamental human rights'.¹¹¹

¹⁰⁸ Neil Gold 'Foreword' in Le Brun & Johnstone op cit note 30 at x.

¹⁰⁹ Ibid (emphasis in original).

¹¹⁰ Klare op cit note 12 at 150.

¹¹¹ The Preamble to the Constitution.